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# Judging and Conciliation – Differentiations and Complementarities

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# Judging and Conciliation – Differentiations and Complementarities

Peter Collin

*This paper is based on an introductory lecture, held at the workshop "Conciliation and Judging – Differentiation and Hybridization" (Frankfurt/Main, 9/10 February 2012, Max-Planck-Institute for Legal History, Frankfurt/Main).*[1] *This workshop launched the program of the LOEWE*[2] *Research Focus "Extrajudicial and Judicial Conflict Resolution"*[3].

*The LOEWE Research focus consists of joint research between academics of the Goethe University Frankfurt/Main, the Max-Planck-Institute for European Legal History, the Frankfurt am Main University of Applied Sciences and (as an associated Partner) the Society for Imperial Chamber Court Research (Wetzlar). This joint comparative research project is aimed at the interdisciplinary and international analysis of conflict resolution in different epochs and dissimilar cultures.*

*Diverse forms of conflict resolution were established throughout the course of history: state and non-state, judicial and extra judicial, consensual, authoritarian, contradictory forms, etc. This contribution ties in with a German tradition of discussions which broaches the issue of the alternatives of conflict resolution under the phrase "Richten oder Schlichten (Judging or conciliation). The paper sketches the life path of this discussion and develops some tentative considerations on how semantic confrontations of "Richten" and "Schlichten" can be made palatable in order to develop research questions and analytical patterns from a historical as well as a current-day perspective. The lecture format is maintained. The footnotes are restricted to the absolute minimum.*

[1] See urn:nbn:de:hebis:30:3-269744. Many thanks to Dieter Petzsch for comments and corrections.

[2] LOEWE is the acronym for "Landes-Offensive zur Entwicklung wissenschaftlich-ökonomischer Exzellenz".

[3] See www.konfliktloesung.eu.

# I. Fundamental questions

## 1. Guideline narratives of the history of conflict resolution?

Is it possible to describe the essential trends of conflict resolution in Europe from the Early Middle-Ages to the present age in a few words? Raoul Charles van Caenegam tried to put it in a nutshell in his "History of European Civil Procedure" (1973). In his words the European procedure "has developed from publicity to secrecy, from orality to writing, from directness and simplicity to protraction and complication, but also from formalistic ritual to the precedence of substance over form, hence also from formal rigor to the domination of equity and the conviction of the judge …".[4]

One can argue about the reasonability of such historical summaries. All the same Caenegam's short description alludes to some important aspects of the historical developments. And it opens enough space for variations. But it is affected by a retrospective understanding of the development of conflict resolution. It does not necessarily present a success story of conflict resolution but a story of a successful rationalization of conflict resolution, that is to say a story of rationalization from the internal perspective of a modern legal rationality. And it describes – also in the European context – only a main path of the development of conflict resolution. It ignores the byways, the cut development directions, the niches outside the state jurisdiction, the mechanisms of conflict resolution which came into operation before, beside or after state court proceedings.

The research of the recent years has certainly presented a colorful panorama of different forms of conflict resolution. In many cases the focusing on state institutions, on legally based mechanisms of procedure, on legal dogmatic development directions is complemented by other perspectives. But the question why particular forms of conflict resolution dominated, and to what extent that relates to preferences of the "users of justice" or to claims to power of the state or claims to participate of parts of the society is insufficiently explored in German legal history.

## 2. Linkages between the present and history, modernity and pre-modernity

But even these questions become more and more important when conventional structures of conflict resolution are on trial, because they no longer seem appropriate for new needs of regulation to be adjudicated. Such diagnosis can be made for the present. "Mediation" is an influential key concept, international arbitration courts are very active and develop normative standards sui generis, varied forms of mediation and bargaining are becoming more

[4] Raoul Charles van Caenegam, History of European Civil Procedure, in: Mauro Cappelletti (Ed.), Civil Procedure (International Encyclopedia of Comparative Law, Vol. XVI), Tübingen / Paris / New York 1973, Col. 3-113, 109.

accepted in die fields of criminal law and administrative law, the institution of the ombudsman is gaining more and more recognition.

As a mere marginal comment it needs to be said that this is not a unique phenomenon in a historical perspective. Already at the beginning of the 20th century a broadening of mediation bodies, conciliation committees and arbitration courts was noticed.[5] It was registered that commercial arbitration courts in particular sectors had almost completely displaced state jurisdiction.[6] And in the sixties and seventies, but also still in the eighties a broad discussion took place about the democratization of the jurisdiction, about the inclusion of the aggrieved parties in the approach to and the decision of their conflicts – reference will be made to this later. But the reference to similar phenomena in the past as such does not initially signify more than a vague feeling of déjàvu.

That raises the question about the legitimation of the overall project "Extrajudicial and judicial conflict resolution" in which historians, sinologists, legal historians and legal scholars have become involved, and in doing so connecting historical and current fields of research. If one focuses on the potential of historical knowledge for the explanation of current problems, the stereotypical phrase, that only one who knows the past can shape the future, does not suffice. The traditional function of legal history with its self-claimed task enriching the interpretation of existing law through the knowledge of its origin and development contexts will also play a rather minor role.

The claim of connecting past and present in a scientific manner is pointed out by the differentiation between "modern" and "pre-modern", which is the guiding differentiation of the overall research project, because both these terms indicate not only a differentiating[7] but also an interrelating perception, especially in relating to the present and the future. Globalization does not only create worldwide uniform standards of modernization, but it also generates manifold institutional arrangements in which non-western societies connect traditional patterns with modern western conceptions, however also with patterns of modernity which originate from a former developmental stage. These are variations of what Eisenstadt describes as "multiple modernities"[8] which are only explicable in their historical dimensions. One example is the "shari'ah board" in some Islamic countries which is in charge of the evaluation of the admissibility of economic transactions. On the one hand it operates within the legal

[5] Refer only to Justus Wilhelm Hedemann, Das bürgerliche Recht und die neue Zeit, Jena 1919, p. 14: „… überall sehen wir Einigungsämter, Schlichtungsausschüsse, Schiedskommissionen auftauchen"

[6] Instructive overviews to the field of operation of the commercial arbitration courts are to be found in Walther Haeger, Schiedsgerichte für die Rechtsstreitigkeiten der Handelswelt, Berlin 1910; Ernst Reimer / Richard Mussfeld, Die kaufmännischen Schiedsgerichte in Deutschland, Berlin 1931.

[7] To this Lutz Raphael, Rechtskultur, Verrechtlichung, Professionalisierung, in: Christoph Dipper (Ed.), Rechtskultur, Rechtswissenschaft, Rechtsberufe im 19. Jahrhundert. Professionalisierung und Verrechtlichung in Deutschland und Italien, Berlin 2000, p. 28-48, esp. 31 ff.

[8] Shmuel N. Eisenstadt, Multiple Modernities, in: Daedalus 129 (2000), p. 1-29.

framework of the shari'ah; on the other hand it is subjected to state laws which incorporate the standards of the modern global economy.[9]

In this global dimension the linkage of modernity and pre-modernity manifests itself and for this reason the necessity of joining historical and current aspects becomes clear.

Such linkages become visible on an intrastate level too. After a recent statement by the minister of justice of Rhineland-Palatinate, who had expounded that he regarded Islamic arbitration bodies as acceptable, media reaction inevitably followed in which sober considerations about the legal problems (such as the applicability of the shari'ah within the framework of Private International Law) played only a marginal role. As a matter of course the minister of justice responded with the statement that he would not tolerate "Steinzeit" (Stone Age attitudes) by any means.[10] Perceptions of modernity and pre-modernity are also reflected in such disputes, and the historical argument is brought into play.

Finally, it has to be stated that also the purely German discussion about alternative forms of dispute resolution was partly charged with historical connotations insofar as current models were contrasted with pre-modern forms of conflict resolution. The palaver practiced in non-state societies in which solutions acceptable to all were found, was confronted by a state jurisdiction which operated in an authoritarian mode. Even though such conceptions were soon considered very skeptically with reference to the possibility of their realization[11] and no longer dominate the discussion. They nonetheless reveal that the reflection of our way of handling conflicts is affected by at least subliminal presuppositions on efficient interaction which connect occasionally positive or occasionally negative connotations.

One logical goal of the LOEWE Research Focus is also the generation of knowledge which enables reflection in a fundamental manner – pondering the strangeness and proximity of historical models of conflict resolution for the present. The advantage of a historical consideration lies in this context, in that it can gather information about failure and success. Whereas failure or success did not inevitably originate from the quality of a particular conflict resolution institution but could also come from the vicissitudes of the development of the framework conditions. Thus it is not about the transfer of successful models or the avoidance of "flop"-models but rather about the insight into specific practical constraints and path dependencies, and at once also about the carving out of functional patterns which have outlasted the times, and about problematic elements of conflict resolution which have demanded solutions at any particular time: participation, enforceability, acceptance, transparency or costs.

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[9] For example for Jordan and Kuwait Mathias Rohe, Das islamische Recht. Geschichte und Gegenwart, 3rd edition, München 2001, p. 186.

[10] Johannes Wiedemann, Die Angst vor der muslimischen „Paralleljustiz", Welt Online, 3 Februar 2012 (URL:http://www.welt.de/politik/deutschland/article13850040/Die-Angst-vor-der-muslimischen-Paralleljustiz.html; last viewed on 7 March 2012).

[11] Jörg Requate, Ombudsmann und „Runder Tisch". Zur Geschichte der Debatte um Alternativen zur Justiz in der Bundesrepublik der sechziger und siebziger Jahre, in: Hagen Hof / Martin Schulte (Eds.), Wirkungsforschung zum Recht III. Folgen von Gerichtsentscheidungen, Baden-Baden 2001, p. 273-282, 279.

## II. "Judging" and "Conciliation" – booms and the change of legitimations

Virtually like in a magnifying glass these constellations of problems are reflected in the formula "Judging and Conciliation". The choice of this combination of words for the title of this contribution is not particularly original, because several combinations of both terms came into operation in the legal-political and jurisprudential discussions of the past few decades. To mention just a few examples: In 1929 a dissertation was already published with the title "Richten und Schlichten im Arbeitsrecht" (Judging and Conciliation in Labor Law).[12] In 1985 Hans Prütting posed the question "Schlichten statt Richten?" (Conciliation instead of Judging?).[13] A brochure with the title "Schlichten ist besser als Richten" (Conciliating is better than Judging), which informs about extrajudicial legal advice and legal protection[14], has been published by the federal government in many editions since 1983.[15] A dissertation on victim-offender mediation was titled "Schlichten oder Richten" (Conciliation or Judging), and some time ago the *Frankfurter Allgemeine Zeitung* concerned itself with the new mediation law under the heading "Ist Schlichten besser als Richten?" (Is Conciliation better than Judging?).[16]

However, the expansion of the use of the term "Conciliation" to a multitude of fields of law is quite new. Even though "Conciliation" was already established as an unspecified concept for a new style of proceeding and decision-making[17], it was primarily used in an institutionalized sense for the handling of labor-law conflicts in the Weimar Republic.[18] Not until the sixties did the legal-political debate make use of it in an extensive manner. The background was a discomfort to a jurisdiction which remained – in the apperception of particularly left-leaning jurists – in traditional authoritarian structures. The efforts for the democratization of the jurisdiction accompanied the efforts for the establishment of possibilities for conflict regulation outside of the traditional judicial system. Theodor Rasehorn for example demanded in 1969 that the judge should alter his role: from an authoritarian decision-maker to an adviser – sitting with litigants at a round table.[19]

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[12] Hans Vogt, Richten und Schlichten im Arbeitsrecht, Bonn 1929.

[13] Hanns Prütting, Schlichten statt Richten?, in: Juristenzeitung 1985, p. 261-269.

[14] Presse- und Informationsamt der Bundesregierung (Ed.), Schlichten ist besser als Richten. Beratung und Vermittlung in Streitfällen, 13th edition, Bonn 1997.

[15] The 13th edition was published in 1997 (as per information of the catalogue of the State Library Berlin).

[16] Christian Geyer, Ist Schlichten besser als Richten, in: FAZ, 31 January 2012 (URL: http://www.faz.net/-gqz-6xc5d, last viewed on 8 March 2012).

[17] Max Rümelin, Rechtspolitik und Doktrin in der bürgerlichen Rechtspflege, Tübingen 1926, p. 22.

[18] Wilhelm Herschel, Grundfragen der Schlichtung im Lichte der Rechtswissenschaft, Borna-Leipzig 1931; Karl Dressler, Die rechtliche Natur der Schlichtung, Tübingen 1931; Werner Brauns, Die Kollegialentscheidung in der Schlichtung, Borna/Leipzig 1932.

[19] Theo Rasehorn, Von der Klassenjustiz zum Ende der Justiz, KJ 2 (1969), p. 273-283, 280; as cited by Requate, Ombudsmann (fn. 10), p. 277.

But such far-reaching conceptions of the reform of the judicial system had no chance of implementation. The sociology of law which was furthermore affected by reforming ambitions subsequently directed its attention more to forms of extrajudicial conflict resolution. These had to a great extend been established in the meantime: arbitration boards for the regulation of consumer conflicts (for example for customer complaints about dry-cleaning) or when buying a second-hand car), for the regulation of conflicts between clients, construction companies and architects, between tenants and landlords, between doctors and patients, etc.[20] Furthermore, the extension of the jurisdiction of the Schiedsmann (arbiter), who was a part of the organization of the justice in many federal states of Germany, was considered.[21]

The discussion about participation and about access to justice in the seventies and eighties, conceptions of a "free discourse", which "really" could resolve conflicts, and other motivations[22], which found their projection screen in forms of non-state or pre-state conflict resolution, as well as ethnological approaches, which partly associated with that, affected the discussion about judicial reform to a greater or lesser extent.[23] But since the end of the eighties a change in approach has taken place. A more pragmatic-technocratic view has prevailed.[24] Extra-judicial conflict resolution has one greater legitimation through the function of alleviation of the state jurisdiction. Since the nineties a rising suggestive power of models from the Anglo-Saxon law family can be registered[25]: Alternative Dispute Resolution was a term with a positive connotation – even if there were critical voices which alluded to the advantages of the German system of state jurisdiction, its efficiency and its cost-effectiveness.[26] The triumphal procession of mediation as a self-contained model of conflict resolution had started. And in recent times appropriate modes of conflict resolution in multi-normative societies have been discussed, particularly in areas of limited statehood. There "Adjusting instead of judging" appears not only as a makeshift in order to compensate the weak assertiveness of

[20] Hubert Rottleuthner, Einführung in die Rechtssoziologie, Darmstadt 1987, p. 145 ff.; Dorothee Eidmann, Zur Logik außergerichtlicher Konfliktlösung, Baden-Baden 1993, p. 9 f.

[21] Similar considerations at Länder authority prompted the study by Klaus F. Röhl (Ed.), Das Güteverfahren vor dem Schiedsmann: soziologische und kommunikationswissenschaftliche Untersuchungen, Köln et al. 1987.

[22] To this informative Klaus F. Röhl, Rechtspolitische und ideologische Hintergründe der Diskussion über Alternativen zur Justiz, in: Erhard Blankenburg / Walther Gottwald / Dieter Strempel (Eds.), Alternativen in der Ziviljustiz, Köln 1982, p. 15-27, 17 ff.

[23] This discussion has been impressively documented by Ehrhard Blankenburg / Ekkehard Klausa / Hubert Rottleuthner (Eds.), Alternative Rechtsformen und Alternativen zum Recht (Jahrbuch für Rechtssoziologie und Rechtstheorie 6), Opladen 1980; Erhard Blankenburg / Walther Gottwald / Dieter Strempel (Eds.), Alternativen in der Ziviljustiz, Köln 1982.

[24] Johannes Caspar, Schlichten statt Richten – Möglichkeiten und Wege außergerichtlicher Streitbeilegung, Deutsches Verwaltungsblatt 1995, p. 992-1003, 993; Requate, Ombudsmann (fn. 10), p. 280.

[25] See only Rolf A. Schütze, Alternative Streitschlichtung. Zur Übertragbarkeit ausländischer Erfahrungen, ZVglRWiss 97 (1998), p. 117-123, 117: „Die alternative Streitschlichtung scheint das Modethema Nr. 1 zu sein."

[26] Schütze, Alternative Streitschlichtung (fn. 24), esp. 122 f.

a rudimental system of state justice, but also as an accepted element of a regulation set of management of multi-normativity.[27]

## III. Historical embeddings and current research problems

Which connecting lines can be drawn from this short retrospection to the objective of this workshop?

### 1. Wider connotational impact of "Schlichten" (Conciliation)

The term "Schlichten" (Conciliation) is not only an analytical term. It has always had a wider connotational impact. Conceptions of freedom from rule and freedom from the state were and are associated with it – especially when contrasting it with "Richten" (Judging): "Schlichtung" allows the protagonists to speak in their "own" language, not in the language of the law, it releases the conflicts of the corset of legal relevance, it pledges a comprehensive consideration of the interests of the parties, and it promises a positive sustainable resolution of their problems (instead of a mere reactive legal decision)[28] – despite empirical research results related to the importance of this form of conflict resolution: In the middle of the eighties, when there was talk of "conciliation euphoria" ("Schlichtungseuphorie"), it was simultaneously asserted that the number of cases, which were brought to trial to the "Schiedsmann" (arbiter), had hit rock bottom.[29]

### 2. Stimulation of concept formations and categorizations

The legal-political discussion also stimulated the formation of concepts and the differentiation of concepts, it was often resorted to English terms or terms were translated into German. The diverse forms of conflict resolution were classified with the help of scaling in relation to formalization, influence of the litigants on the procedure, the level of norm-orientation, the level of interest-orientation, etc.[30] Therefore diverse manifestations of conflict resolution could be distinguished and connected with further connotations.

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[27] See Matthias Kötter, Konferenzbericht zur Tagung „Decisionmaking on Pluralist Normative Ground" (17.-19. Mai 2011, Berlin), in: WZB-Mitteilungen 131/2011, p. 44-45.

[28] See to this (critical) Prütting, Schlichten (fn. 12), p. 22; Joachim Franz, Pierre Bourdieux und Niklas Luhmann vor dem Schlichter. Schlichtungsgespräche im Kontext einer Ökonomie des sprachlichen Tauschs sowie der Systemtheorie, in: Beate Henn-Mennesheimer / Joachim Franz (Eds.), Die Ordnung des Standard und die Differenzierung der Diskurse, Teil 1, Frankfurt a.M. 2009, p. 253-270, 253 f.

[29] Rottleuthner, Rechtssoziologie (fn. 19), p. 151: In 1975 38,000 arbitrator proceedings took place, in 1985 22,000. Thereby an existing trend continued.

[30] Dorothea Jansen, Das Güterverfahren vor dem Schiedsmann, in: Klaus F. Röhl (Ed.), Das Güteverfahren vor dem Schiedsmann: soziologische und kommunikationswissenschaftliche Untersuchungen, Köln et al. 1987, p. 3-387, 6.

This work which was targeted at the creation of new conceptualizations and systematizations can certainly be helpful for the analysis of current developments as well as historical considerations, but one has to take into account the fact that it is driven by modern, partly ideological, partly state-justice-centered bondages, which require a historically critical consideration as well.

### 3. Legal-political "booms" as gateways for interdisciplinarity and multidisciplinarity

The focusing on extrajudicial conciliation has promoted the perception of ethnological finding and the intensification of research relating to sociology of law – and also attempts to generate models for analysis which can claim temporal and national comprehensive validity.[31] One can ledge onto that. At least approaches which are led by general legal-cultural or social-structural assumption should not be disregarded a priori.

## IV. Problems with the application of modern terms

### 1. "Schlichten" in the arsenal of the ADR-terminology

But which categories can be used as a point of departure? The current discussion about Alternative Dispute Resolution (ADR) mainly differentiates between arbitration, mediation, conciliation, facilitation, ombudsman-procedures and fact finding.[32] The difference between conciliation and mediation is usually defined so that the arbiter in the case of reconciliation exerts more influence on the decision-making of the litigants (for example in the way of a – nonbinding – arbitral award) than a mediator, even if the differentiation is difficult in many cases and in some legal systems the terms "conciliation" and "mediation" are used synonymously.

### 2. Problems of conceptual contouring of the term "Richten" (judging)

On the other hand the integration of the term "Richten" into the arsenal of the ADR-terminology is difficult if one connects "Richten" with the conception that a third person adjudicates the conflict with binding effects, because both the arbitration court – as a form of ADR – and the state court fall in that category. What is demonstrated here is the fact that the ADR-discussion takes place in a modern context, because it separates a relatively fixed and con-

[31] Jansen, Güterverfahren (fn. 29), p. 6 f.

[32] Klaus J. Hopt / Felix Steffek, Mediation – Rechtsvergleich, Regelungsmodelle, Grundsatzprobleme –, in: idem (Eds.), Mediation: Rechtstatsachen, Rechtsvergleich, Regelungen, Tübingen 2008, p. 3-102, 16.

solidated (contradictory) form of state justice from other forms of conflict resolution. Such explicit lines of demarcation cannot be drawn in a historical perspective. In this perspective the identification of the criteria for the differentiation between state jurisdictions, communal jurisdictions, jurisdictions organized on a corporate basis, other intermediate jurisdictions and private jurisdictions, i.e. between state and non-state justice is not simple – also in view of the limited reasonability of the term "state". However, a historical contextualization is necessary in every individual case.

### 3. Conceptual contouring of other forms of handling conflicts

A further aspect can be added: Reactions to conflicts can also happen in other forms: Ignoring, avoidance, and (interestingly in this context) self-help are mentioned in the literature.[33] But they don't fit into patterns which are affected by legal systematizations. That raises two problems: Firstly, such legal systematizations are not adequate for a legal-historical perspective, because self-help could definitely be a reaction to conflicts which was acknowledged by law. And secondly, one can – as Gerd Spittler showed and as is to be elucidated later in this text – explain the functionality of conciliation, although limited, in several societies because self-help is available as an alternative solution.[34]

Thus at this point it can be constituted that a historical and comparative perspective has to be thought outside of the box of the ADR-categorizations and that the conceptual duality of "Richten und Schlichten" – if one wants it to bear fruit in an analytical reference – can be adapted in the context of the ADR-discussion only to a limited degree, because the fundamental differentiations of the ADR-discussion are different. That leads us to the question in which way the conceptual duality of "Richten und Schlichten" can be brought into operation so that an analytical "added value" can be generated.

## V. Configurations of "Richten und Schlichten"

### 1. "Schlichten und Richten" as an alternative

Initially it appears to be the most plausible way to consider „Schlichten und Richten" as an alternative, thus "Schlichten" *or* "Richten" or "Schlichten" *instead of* "Richten". In this case we have to turn to the analysis of the differences, to the conditions of the existence of such an alternative, and to the questions which options the "users" of justice have and why they make their choice – many variations of alternative order come into question, I will explain this

[33] Arthur Hartmann, Schlichten oder Richten. Der Täter-Opfer-Ausgleich und das (Jugend-)Strafrecht, München 1995, p. 15 f.; Gerd Spittler, Streitregelung im Schatten des Leviathan, Zeitschrift für Rechtssoziologie 1/1980, p. 4-32.

[34] Spittler, Streitregelung (fn. 32), p. 21 ff.

later in the text. However, another combination of "Schlichten" und "Richten" is possible. So, one can focus on relationships of mutual dependencies, which are again possible in different variations.

## 2. "Richten und Schlichten" as relationship of mutual dependencies

One example is provided by Spittler, who stated that the functionality of a system of conciliation is dependent on the existence of a state jurisdiction to a great extent: State courts monopolized the serious cases and alleviated the non-state traditional conciliation. The state courts were also responsible for conflicts among different ethnic groups, thus for conflicts for which a common normative horizon did not exist and which therefore were less suitable for conciliation. But the state monopoly on violence also impeded self-help and made the conflicting parties more accessible for conciliation. Conciliation thrived – using a formulation of Spittler – in the shadow of the Leviathan.[35]

## 3. "Schlichten und Richten" as a sequential arrangement

Finally „Schlichten und Richten" can be considered as a sequential arrangement. In that case "Schlichten" and "Richten" act as procedural elements of a process of conflict resolution which is designed or reconstructed as an integrated procedure. Such a sequential arrangement can be found in the modern German civil procedure. § 278 of the German Civil Procedure Code prescribes that a conciliation hearing has to precede the contradictory oral proceeding. But the reverse is also possible. For example, it has been pointed out that in "medieval" Japan the judgment was not the end of the procedure. In fact in a legal system, which knew neither judgments with final and binding effect nor an effective system of execution, a judgment required further settlements between the conflicting parties.[36] What is demonstrated here is the fact that our modern thinking about the process of the legal handling of conflicts is based on preconditions of judicial infrastructures which are not self-evident in a historical perspective.

Finally, the formula of "Schlichten und Richten" can circumscribe an area of research in which hybrid forms can be explored, i.e. forms containing elements of judging as well as elements of conciliation, for example the arbitration procedure.[37]

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[35] Spittler, Streitregelung (fn. 32), p. 23 ff.

[36] Yoichi Nishika, Die gerichtliche Konfliktlösung im europäischen und japanischen Mittelalter, in: Wolfgang Fikentscher (Ed.), Begegnung und Konflikt – eine kulturanthropologische Bestandsaufnahme, München 2001, p. 106-117, 109.

[37] Jansen, Güterverfahren (fn. 29), p. 6.

## VI. Functional elements and functional preconditions of "Schlichten und Richten" – contrasts and smooth transitions

When we return to surely the most important configuration of "Schlichten und Richten", i.e. "Schlichten und Richten" as an alternative, it appears that this alternative cannot be understood as an alternative per se. As a start, one has to establish whether an option exists. Then at first one should take the preferences of the "users" of justice into consideration. Which forums are chosen by the conflicting parties, and for what reason, in order to settle their disputes? Different aspects play a role: the complexity, the length and the costs of a procedure, the agreement of the decision criteria with the normative standards of the conflicting parties, the relevance of extra-legal aspects, the possibilities of manipulating the procedure, the predictability of the result, etc. – whereat the preferences of both (or more) conflicting parties can differ.

All these are grave factors which can affect the behavior of the "users" of justice. But in order for "Richten" and "Schlichten" to be a real alternative, appropriate options must exist. However, such options are often not available or, if so, only on a limited scale. The "users" of justice are faced by a Hobson's choice, either because the use of a particular instance is compulsory[38], or conciliation bodies or courts, which they could have utilized, do not exist, or because the social pressure of their community prevents a free choice.

Through this, the question of alternatives shifts to another level: The question is not, what the motives of the "users" of justice are. The question is, what the reasons of the state or social groups are. Why do they establish particular forms of conflict resolution and why do they provide such forms in an alternative or a cumulative manner? Why do they create conditions which complicate or alleviate the path to the one or the other institution of conflict resolution?

That leads us to the question of the functionality of forms of conflict resolution and thereby to the question of functional elements and functional conditions of judging and conciliation. –The following presentation limits itself to four aspects: (1) leading rationalities, (2) participation of the conflicting parties, (3) legitimation, and (4) reflection.

### 1. Leading rationalities

The leading rationality of judging is the law – or at least a conception of adequateness or equitableness which is applied by the judge and accepted by a significant part of the community. What is the leading rationality of conciliation? As mentioned before, conciliation can take place among the shades of judging, being aware that a later judicial treatment of the case is possible. Therefore conciliation is open to the rationality of the law. But then what is the

[38] For example at a divorce.

difference to the rationality of judging? Is it the bare balancing of interests as an additional element of orientation?

At least in those cases, in which conciliation takes place within local, professional or other groups with a common normative background, it is plausible that group specific norms are integrated which can (don't have to) feature normative or even legal-normative character. It also can be a question of rather pragmatic considerations or of psycho-social phenomena. In any case we cannot say that judging is communication within the legal system whereas conciliation communicates outside of the legal system. But it can be said that conciliation is situated at the periphery of the legal system and is affected by added communication-steering rationalities to a greater extent than judging.[39]

## 2. Participation of the conflicting parties

In the case of judging, the parties can control the procedure, less so in some law families, more so in other law families. But the judge takes the decision. But who takes the decision in the case of conciliation? In the understandings of conciliation developed in the literature the conflicting parties decide, although the conciliating third person has more influence on the decision than in the case of mediation.[40] That a conciliator can de facto mutate into a judge during a conciliation procedure is a widely recognized fact, the reasons can differ: social prestige, predominant knowledge, covert power to impose sanctions. Therefore – and this point does not appear to be unimportant – the classification of judging or conciliation should not only orientate itself according to formal criteria (like the name of a procedure or the institution of conflict resolution) but also according to the mode of communication and decision which factually determines the procedure.

But as much as the power of the neutral third person can vary, the power of the conflicting parties can also vary. The more a party insists on its claims, the more promising are its chances that the conciliator will respond with advantageous settlement proposals – as stated in studies on conciliation hearings. But the conciliator can also undermine his position. If he advises the conflicting parties comprehensively, they have more information on their rights and alternatives and are more self-confident. That decreases the opportunities of the conciliator to control the procedure and to enforce his proposals of settlement.[41]

Finally, conciliation could be more open to the influence of other persons or organizations which can go along with a lesser influence of the conflicting party. That was the case – as Steinmetz reported on the labor conflicts in England in the 19th century – when trade unions coached workers on the settlement of disputes and on this occasion embedded the dispute in its own political agenda.[42] The consideration, that individual interests are de-in-

[39] Franz, Pierre Bourdieux und Niklas Luhmann vor dem Schlichter (fn. 27), p. 268 f.
[40] Hopt / Steffek, Mediation (fn. 31), p. 17.
[41] Jansen, Güterverfahren (fn. 29), p. 380 ff.
[42] Willibald Steinmetz, Begegnungen vor Gericht. Eine Sozial- und Kulturgeschichte des englischen Arbeitsrechts (1850-1925), München 2002, p. 269.

dividualized in a court case because of their subordination under legal rationalities whereas in conciliation procedures the person can bring in his/her personal interests to the fullest extent, loses persuasive power, when it is taken into account that a complexity of interests can play a role.

## 3. Legitimation

Judging is exercising power. Therefore it requires legitimation. The more the "users" of justice are forced to subordinate their conflicts to jurisdiction, the stronger the pressure to legitimize becomes. This manifests itself in multiple respects. Not only the judge has to be legitimized. The procedure also has to conform to particular legitimation requirements. It is structured in such a manner that the facts are appropriately reconstructed leaving as little doubt as possible.[43] The trial has to be fair. As a rule the parties must have the possibility to appeal against the decision.

In contrast, conciliation does not end in a decision with binding effect. And typically the conflicting parties decide voluntarily on conciliation – except when being forced to do that because other options of action are not available. But generally a conciliation does not need normative structuring when viewed from the perspective of legitimation. However, a normative structure of conciliation can be found. Which aspects of legitimation play a role in these cases?

## 4. Reflection

Judging aligns itself with norms which claim prevalence. Therefore judging – when its results are published – exposes itself to a meta discourse in which one can check and criticize the sentences, one can systemize them and take them as a basis for further development of the law.[44] If the sentences are not published, review, correction and analysis by superior instances are at least possible (even though not always coercive in a historical perspective). Due to the orientation on norms the results of judging ensure traceability. It can be argued about the latter for good reasons.

Results of conciliation are less open to reflections, particularly in the case where the conciliatory proceedings are closed. If the results of conciliation are known, they can, of course, be criticized. But the criteria for critiques are uncertain and can vary, because the question is, which criterion, which rationality shall govern. Even if legal rationalities have an effect on decision-making, they often go along with other rationalities and orientations. Finally, conciliation is subordinated to an internal rationality of the persons concerned – a rationality which from case to case is a changing mixture of (often) legal rationalities and other rationalities, sometimes linked with particular interests of the public.

[43] Hartmann, Schlichten oder Richten (fn. 32), p. 34.
[44] Eidmann, Logik (fn. 19), p. 12.

Differentiations and hybridizations – that is the subheading of the title of our workshop: The mission is to differentiate between judging and conciliation; it is to carve out internal differentiations within those basic differentiations, but mixtures of these modes of conflict resolution are also to be found out. I have tried to contribute some of these elements – sometimes in the form of answers but mostly in the form of questions. Further elements will without doubt be found at this symposium.